A

AINGARAN MUNIANDY v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN DIAH JCA

B

[CRIMINAL APPEALS NO: B-05(SH)-252-06-2017, B-05(SH)-254-06-2017, B-05(SH)-256-06-2017, B-05(SH)-258-06-2017 & B-05(SH)-262-06-2017]
2 AUGUST 2019

C

CRIMINAL PROCEDURE: *Appeal – Decision of trial judge – Accused persons originally charged under s. 302 of Penal Code – After defence case, trial judge found no common intention to commit murder – Accused persons convicted under reduced charge of culpable homicide under s. 304(a) of Penal Code – Whether common intention necessary to sustain conviction under s. 304(a) – Whether trial judge erred*

D

in convicting appellants after finding defence raised reasonable doubt on prosecution case – Whether there was credible evidence to support prima facie case against accused persons – Whether involvement of two others still at large sufficiently investigated – Whether convictions of accused persons safe

E

PW12, the wife of Bala who was the second accused in the High Court, had blocked the car of one Thamaraja Rajagopal ('victim') at the car park of the block of the apartment where they were then staying. This led to a verbal altercation between them when PW12 refused to remove her car, accusing the victim of causing scratches to her car. Bala arrived shortly after with the third accused ('Rasu') and they were later joined by the fourth accused

F

('Anbearasan'). Subsequently, the first accused ('Aingaran') came in his own car. PW10, the victim's nephew, claimed that he saw Anbearasan taking out a 'parang' and Rasu, three parangs, and they then used one of it to deliver the first blow on the victim. The rest of the appellants then joined in the attack. The victim's wife ('PW13'), who was also present during the

G

altercation, corroborated the evidence of PW10 and claimed that she actually kneeled before Anbearasan to save her husband but instead the latter directed Aingaran and Rasu to slash the victim. These two were joined in the act by two other unknown persons. The other eyewitness to the incident was the victim's brother ('PW16') who heard Bala and Rasu calling the victim using

H

derogatory words. He was also slashed on his back and ran away, but he came back and saw Bala, Rasu, with two others unknown to him, slashing the victim. The victim's death was certified to be due to head injuries at the back and over the right side of his head and these were caused by a sharp cutting weapon. Each of the four accused persons were charged under s. 302 of the Penal Code ('PC') read with s. 34 of the PC for causing the death of

I

the victim. The High Court Judge ('HCJ') found that a *prima facie* case had been proven against all the four appellants and that the evidence of PW10, PW13 and PW16 were credible, consistent, was not shaken although intensively challenged during cross-examination. The common trait in the

respective defences of the appellants was that the injuries to the victim were caused by two other persons called Yogeswaran and Sam who came to the scene together with Aingaran. The 'parangs' used by Yogeswaran and Sam to slash the victim were actually taken from an umbrella by the victim's brother, Logeswaran, who was at the scene with him. These 'parangs' were later used by Yogeswaran and Sam to slash the victim. According to Aingaran and Rasu, it was the victim who attacked Aingaran first by punching him on the neck and then the victim took out the parang. This prompted Yogeswaran to kick the victim and grab the 'parang' from him and then proceeded his attack on the victim. When Logeswaran fled the scene, Sam took the 'parang' which Logeswaran left behind to slash the victim. The two witnesses called by the four appellants were actually offered to the defence by the prosecution and they all testified that the actual culprits were Yogeswaran and Sam. Upon hearing the accused persons' respective defences, the HCJ found that the death of the victim was the result of a grave and sudden provocation which was committed during a sudden fight and therefore, reduced the charge to that of culpable homicide under s. 304(a) of the PC. This the HCJ did despite finding that there was no common intention to commit murder. All the four appellants were then sentenced to 20 years imprisonment. Hence, this appeal.

Held (allowing appellants' appeals and dismissing prosecution's appeal)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) The four appellants never raised the defence of sudden fight or grave and sudden provocation. However, the trial judge could act on his own motion and raise the exceptions to s. 300 of the Penal Code, either singularly or jointly, since these are specific exceptions provided by the Penal Code. It is trite law that a trial judge is empowered to enter a conviction for a lesser or equivalent offence other than that for which an accused is charged as long as the evidence adduced at the trial supports such a conviction. (para 14)

(2) The High Court Judge ('HCJ') had made an affirmative finding that there was no common intention, *albeit* for murder. In view of that express finding, the conversion of the charge to that under s. 304(a) of the PC should not have been made because the ingredient of common intention was still necessary to sustain a conviction under the said section. At the point in time after the finding on common intention was made, an order of discharge and acquittal of the original charge of murder should have been made as HCJ found that the prosecution had failed to prove the charge of murder beyond reasonable doubt. (para 15)

(3) In a case involving more than one accused person and where common intention has been incorporated in the charge, that the respective roles played by each of the accused person must be identified in order to sustain the charge. However, there was an added dimension in this case

which would prevent the court from making the finding, that is, the common defence of all the four appellants that the actual culprits were Yogeswaran and Sam. (para 16)

(4) The victim's relatives who testified were interested witnesses and though their evidence could still be relied upon by the court to base a conviction on, nevertheless it must still be treated with caution and required corroboration. The prosecution led two sets of evidence which contradicted each other and this must be construed against them and to the credit of the four appellants because there was no trustworthy evidence upon which the court could base the conviction on. Thus, there was no credible evidence to support a *prima facie* case against the four appellants. (paras 17 & 19)

(5) Further, in connection to the common defence of the appellants that it was Yogeswaran and Sam who used the 'parang' to slash the victim, the fact showed that, at the initial stage of the case, there were seven persons charged in the Magistrate's Court including the four appellants. However, the investigating officer ('IO') stated that Yogeswaran and Sam could not be located. The IO also did not record any statement from Logeswaran, who was also at the scene and had been arrested for another case, despite having the means to locate Logeswaran. The failure to produce him created a material gap in the prosecution's case and amounted to a suppression of evidence. In fact, the charge against the four appellants never mentioned the involvement of two or more others still at large. (paras 22-25)

(6) Adopting the quote from *Magendran Mohan v. PP*, that 'normally, the appellate court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances. But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the appellate court to step in and correct the legally erroneous decision of the courts below'. The court found that there was such error in this appeal. The conviction of the four appellants under s. 304(a) of the PC was held to be unsafe and therefore, their appeals were allowed. The appeal by the prosecution was dismissed. (paras 26-28)

Case(s) referred to:

Harchand Singh & Anor v. State of Haryana [1974] AIR 344 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(dist)***
Santa Singh v. PP [1937] 1 LNS 81 HC ***(dist)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 300, 302, 304(a)

(Civil Appeals No: B-05(SH)-252-06-2017 & B-05(SH)-256-06-2017)
For the appellant - Rajpal Singh & Tiew Poh Nee; M/s Rajpal, Firah & Vishnu
For the respondent - Asmah Musa; DPP

(Civil Appeal No: B-05(SH)-254-06-2017)
For the appellant - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs & N Sivananthan Jayarubbiny Jayaraj; M/s Sivananthan
For the respondent - Asmah Musa; DPP

(Civil Appeal No: B-05(SH)-258-06-2017)
For the appellant - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs
For the respondent - Asmah Musa; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trials No: 45B-47-10-2014 & 45B-48-10-2014 (overruled).]

Reported by S Barathi

JUDGMENT

Rhodzariah Bujang JCA:

[1] Each of the four appellants in the first four appeals listed above which were jointly heard by us, were charged, under s. 302 of the Penal Code read with s. 34 of the said Code in the Shah Alam High Court for causing the death of one Thamaraja a/l Rajagopal. The charge against them reads as follows:

> Bahawa kamu bersama-sama pada 12 April 2014, jam lebih kurang 9.00 malam, di tempat letak kereta Blok A Melor, Pelangi Damansara PJU 6, Persiaran Suria Damansara, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Thamaraja a/l Rajagopal (No. KP: 820729-14-5073) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[2] Although the learned High Court Judge found a *prima facie* case had been proven against all four appellants, however after hearing their respective defences, His Lordship instead entered a conviction under s. 304(a) of the Penal Code on the ground that the death of the victim was caused by grave and sudden provocation and in a sudden fight. All the four appellants were then sentenced by His Lordship to 20 years imprisonment with effect from their dates of arrest. The last appeal listed in the intitulement above is that of the prosecution against the said decision whereas that by the appellants are also in respect of the said decision for they all desired for an outright acquittal of the murder charge, which was what we ordered after hearing the said appeals on 12 April 2019 whilst that of the

prosecution was dismissed. Our reasons for so deciding are laid out below but first, given the number of appellants and for ease of understanding, we would refer to the appellants by their first and/or short form names in this judgment.

The Prosecution's Case

[3] The fact that led to the death of the victim was innocuous enough. PW12 (Mona), the wife of Balasubramaniam (hereinafter referred to as 'Bala') who was the second accused in the High Court, blocked the car of the victim at the car park of the block of apartment at the address as stated in the charge where they were then staying. This led to a verbal altercation between them when PW12 refused to remove her car, accusing the victim of causing scratches to her car. The victim's nephew, Sundram (PW10) was with the victim at that material time. PW10 alleged that during the heated argument, Mona insulted the victim by calling him "pondan" and then called her husband to come to her assistance. Bala did arrive shortly after with the third accused, Peerarasu (hereinafter referred to as 'Rasu'), who is Mona's brother and they were later joined by the fourth accused, P Anbearasan (hereinafter referred to as 'Anbearasan'). Subsequently, the first accused, Aingaran came in his own car. PW10 claimed to have seen Anbearasan taking out a 'parang' and Rasu three parangs who then used one of them to deliver the first blow on the victim. Then the rest of the appellants joined in the attack. The attack which was against both the victim and him was prompted, said PW10, by Anbearasan but he was lucky to evade the blows. Bala allegedly was heard by PW10 to have said to the victim "Kau tak mati lagi?" before proceeding to slash him further. PW10 said he and PW16, Rajakumaran (the victim's brother), managed to escape from the group.

[4] The victim's wife (Puanneswary) testified as the prosecution's 13th witness (PW13) and was also present during the altercation. She corroborated the evidence of PW10 and claimed that she actually kneeled before Anbearasan to save her husband but instead the latter directed Aingaran and Rasu to slash the victim. These two were joined in the act by two other unknown persons. She heard Bala said "kau ni masih tidak mati lagi" and he proceeded to slash the neck of the victim. The other eyewitness to the incident was the victim's brother Rajakumaran (PW16) who heard Bala and Rasu calling the victim with derogatory words "Pundek! Lanchau". He was also slashed on his back and ran away but he came back and saw Bala, Rasu with two others unknown to him slashing the victim.

[5] It was not disputed that the victim's death, as certified by the pathologist Dr Karunakaran Mathiharavan, was due to head injuries at the back and over the right side of his head and these were caused by a sharp cutting weapon. PW17 also noted in his post-mortem report 13 external injuries on the victim's body. His report (exh. P54) was tendered by

Professor Dr Nadeson (PW17) attached to the Department of Forensic Pathology as at the time of the trial Dr Karunakaran, an Indian national, has left the country in December 2015.

[6] The learned High Court Judge found based on the evidence above that a *prima facie* case has been proven against all four appellants as His Lordship found that the evidence of PW10, PW13 and PW16 were credible, consistent, was not shaken although intensively challenged in cross-examination and said further as follows:

> ... Isu keterangan mereka mengenai bilangan orang yang bersenjata yang telah menyerang si mati, jenis dan bilangan senjata yang terlibat di dalam serangan dan pergaduhan tersebut, jelas tidak tergugat. Keterangan yang disampaikan itu adalah suatu keterangan yang jelas akan kebenarannya serta kewajaran kemunasabahannya. SP13 contohnya, dia yang merupakan isteri kepada si mati telah melihat dengan matanya sendiri insiden tersebut hingga membawa kepada perbuatannya sujud dikaki Tertuduh Keempat. Dia melihat sendiri peristiwa suaminya ditetak. Dia turut mengesahkan akan kehadiran kesemua Tertuduh di tempat kejadian serta telah menceritakan peranan yang dimainkan oleh Tertuduh-Tertuduh.

Although there were contradictions in the evidence of these witnesses, the learned High Court Judge was not persuaded that these were material enough to warrant an impeachment as applied for by the defence.

[7] The learned High Court Judge found that all of the four appellants had caused and were directly involved in causing the injuries to the victim which lead to his death and had the intention to kill him when they did so.

The Defence

[8] All four appellants gave sworn evidence and called three other witnesses in support of their defences. There is a common trait in their respective defences and it is that the injuries to the victims were caused by two other persons called Yogeswaran and Sam who came to the scene together with Aingaran. Bala and Rasu in fact tried to stop them from assaulting the victim. The 'parangs' used by Yogeswaran and Sam to slash the victim were actually taken from an umbrella by the victim's brother nicknamed Opi who was at the scene with him. These 'parangs' were later used by Yogeswaran and Sam to slash the victim. According to Aingaran and Rasu, it was the victim who attacked Aingaran first by punching him on the neck and then the victim took out the parang. This prompted Yogeswaran to kick the victim and grab the 'parang' from him and then proceeded his attack on the victim. When Opi fled the scene, Sam took the 'parang' which Opi left behind to slash the victim.

[9] The two witnesses called by the four appellants were actually offered to the defence by the prosecution and all testified that the actual culprits were Yogeswaran and Sam. DW5 (Heng Wei Yong) went with Rasu to the scene after receiving a call from Bala and witnessed the victim punching Aingaran

after verbally abusing him and who also tried to slash Aingaran with a 'parang'. DW7 (Jayalitha) was with PW12 at that material time and saw the victim pushing the latter's car and crashing into it three times. When she questioned his action, he cursed her with derogatory words such as 'pundek' and 'pelacur'. She too witnessed the victim taking out the 'parang' from the umbrella before she went back to her own flat which was in the same apartment block as the victim.

[10] The learned High Court Judge at the close of the defence case came to this conclusion:

> Setelah saya meneliti serta menghalusi akan keterangan dari saksi-saksi pendakwaan yang seramai 19 orang kesemuanya, serta mendengar dan menghalusi akan keterangan dari Tertuduh-Tertuduh dan tiga orang saksi mereka sendiri, serta setelah meneliti serta menimbangkan akan penghujahan di setiap peringkat, meneliti kepada kedudukan undang-undang yang berkaitan dengannya, mengkaji otoriti-otoriti kes yang dikemukakan, menilai serta menimbang kepada keterangan saksi-saksi secara keseluruhannya, dengan ini **mencapai suatu keputusan iaitu Tertuduh-tertuduh ini di peringkat kes pembelaan ini telah berjaya menimbulkan keraguan yang munasabah terhadap kes pihak Pendakwaan**. (emphasis added)

[11] The learned High Court Judge however found that the death of the victim was the result of grave and sudden provocation which was committed during a sudden fight and therefore His Lordship reduced the charge to that of culpable homicide under s. 304(a) of the Penal Code. This His Lordship did despite finding that there was no common intention to commit murder and the full reasonings on this finding are found in pp. 40-42 of the appeal record vol. 1. Given their importance to this appeal, these reasonings are reproduced below for they are sore points for both the prosecution and the four appellants.

> Walaupun diputuskan oleh Mahkamah Persekutuan melalui kes *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 2 MLJ 336 bahawa keterangan langsung tentang 'prior plan' untuk melakukan kesalahan ini tidak perlu wujud di dalam sesuatu kes, namun di dalam kes ini tiada keterangan ditampilkan bagi menunjukkan keempat-keempat Tertuduh ini berkongsi niat secara bersama untuk melakukan pembunuhan tersebut. Ia wajar dikategorikan sebagai 'a sudden fight in the heat of passion upon a sudden quarrel.'
>
> Mahkamah Persekutuan di dalam kes *Krishna Rao Gurumurthi v. PP & Anor* [2009] 2 CLJ 603 mengenai isu niat bersama menyatakan:
>
> > [60] It is settled law that s. 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate

> criminal act done by several persons in furtherance of the common intention of all irrespective the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.

Perbuatan niat bersama adalah suatu persoalan fakta berdasarkan kepada kedudukan sesuatu kes itu. Inferens perlulah digantungkan kepada tindakan atau perlakuan seorang tertuduh itu, serta partisipasinya. Mahkamah Persekutuan di dalam kes *Krishna Rao Gurumurthi* (*supra*) selanjutnya menyatakan:

> For a charge premised on common intention to succeed, it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34 withstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

Di dalam kes ini, tiada keterangan ditampilkan bahawa terdapatnya pertemuan, perbincangan serta perancangan diatur sesama Tertuduh bagi melaksanakan perbuatan tersebut. Keterangan yang ditampilkan disepanjang perbicaraan berlangsung tidak membuktikan akan kewujudan sebarang "a pre-arranged plan to commit such crime".

Peristiwa yang terjadi ini boleh dikategorikan sebagai 'a sudden fight in the heat of passion upon a sudden quarrel'. Berpandukan kepada situasi tersebut, tindakan Tertuduh-Tertuduh ini adalah terjumlah kepada "culpable homicide not amounting to murder punishable under Section 304(a) Penal Code." Oleh itu, juga berdasarkan kepada keterangan, hanya kesalahan terhadap "culpable homicide not amounting to murder punishable under Section 304(a)" – sahaja yang berjaya dibuktikan oleh pihak Pendakwaan terhadap kesemua Tertuduh. Lantas Pertuduhan di bawah Seksyen 302 Kanun Keseksaan dipinda dan diperturunkan kepada Pertuduhan di bawah Seksyen 304(a) Kanun yang sama.

Oleh yang demikian, kesemua Tertuduh adalah disabitkan di atas kesalahan "culpable homicide not amounting to murder punishable under Section 304(a) Penal Code".

The Appeals

[12] Before us, the four appellants were represented by different counsel. Aingaran and Rasu were represented by a common counsel whilst Bala and Anbearasan each have their own counsel. However, given the commonality of the issues raised by all of them, learned counsel for all four decided to divide these issues amongst themselves and only orally submitted on the ones tasked to them.

[13] Altogether four issues were raised and they are:

(i) the learned High Court Judge erred in convicting the appellants under s. 304(a) of the Penal Code after making a finding that the defence has successfully raised a reasonable doubt on the prosecution's case for the charge of murder;

(ii) the learned High Court Judge erred in finding that there was sudden fight, and grave and sudden provocation;

(iii) failure by the prosecution to call Yogeswaran and Sam or offer them to the defence has created a material gap in the prosecution's case; and

(iv) material contradictions in the prosecution's case from the evidence of PW12 *vis-à-vis* PW10's, PW13's and PW16's evidence.

The Conviction Under Section 304(a)

[14] It is to be noted that the four appellants never raised the said defence of sudden fight or grave and sudden provocation and both the learned Deputy Public Prosecutor ("DPP") as well as learned counsel for the appellants mentioned this fact in their written submission, with all of them questioning the appropriateness of the said convictions. However, no case authorities were cited to us to say that a trial judge has no such power to reduce the charge to culpable homicide when none of the exceptions to s. 300 of the Penal Code was raised by the defence. In other words, can the trial judge act on his own motion and raised the said exceptions, either singularly or jointly as in this case? We were of the view that he could for these are specific exceptions provided by the Penal Code itself and it is trite law that a trial judge is empowered to enter a conviction for a lesser or equivalent offence other than that for which an accused is charged as long as the evidence adduced at the trial supports such a conviction.

[15] However, in this case, the matter was complicated by the fact that the learned High Court Judge had made an affirmative finding that there was no common intention, *albeit* for murder, and this can be seen at pp. 39 - 40 of his grounds of judgment. With due respect to the learned High Court Judge and in the given facts of this case, in view of that express finding, the conversion of the charge to that under s. 304(a) should not have been made because that ingredient of common intention was still necessary to sustain a conviction under the said section. As rightly pointed out by the learned defence counsel, at that point in time after the finding on common intention was made, an order of discharge and acquittal of the original charge of murder should have been made as the learned High Court Judge had, as shown from the excerpts of His Lordship's grounds of judgment reproduced earlier, found that the prosecution has failed to prove the charge of murder beyond reasonable doubt.

[16] Learned counsel for Bala also submitted that nowhere in the grounds of judgment of the learned High Court Judge did His Lordship make a specific finding on the *actus reus* and *mens rea* of the four appellants and when we examined His Lordship's grounds of judgment, we would, again with respect to His Lordship, agree that this was so. It is glaringly obvious, especially in a case involving more than one accused person and where common intention has been incorporated in the charge, that the respective roles played by each of the accused person must be identified in order to sustain the charge. In saying this, we are mindful of the law that common intention can be formed on the spot as decided in *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336 or, as submitted by the learned DPP, relying on *Santa Singh v. PP* [1937] 1 LNS 81; [1938] MLJ 58, that when two and more accused persons armed with weapons jointly attacked a man, it matters not which one of them struck the blow for each one of them is equally guilty of the offence in the same way as if there was only a single assailant. However, in this case, there is an added dimension to the case which we think would prevent the court from making such a finding and that is the common defence of all the four appellants that the actual culprits were Yogeswaran and Sam. Before delving into that issue, in terms of sequence, it would be best for us now to consider the other one issue raised by the defence which was the material contradictions in the prosecution case.

No *Prima Facie* Case

[17] What the relatives of the victim testified as to how the incident happened had been summarily stated earlier. It cannot be denied that they were interested witnesses and though their evidence could still be relied upon by the court to base a conviction on, nevertheless it must still be treated with caution and requires corroboration as stated by the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1 at p. 819 (CLJ); p. 12 (MLJ) as follows:

> [19] It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

[18] Counsel for Aingaran and Rasu has in his written submission highlighted to us the evidence of all three eyewitnesses, at the scene, that is, PW10, PW13 and PW16 which clearly shows the ill-feelings of these three against the four appellants. The same are produced below:

> Pemeriksaan Balas SP10
>
> S: You used call him 'mama'?
>
> J: Dia adalah sepupu kepada ibu saya.
>
> S: How long you have been known him?

J: Sejak lahir.

S: You very sad for his lost?

J: Ya.

S: Do you agree with me that, because of this incident was happened, you desired that these four been punished?

J: Yes, I want them to be punished with law.

S: All of them?

J: Yes.

(see Appeal Record page 45, Volume 2A.)

Pemeriksaan Balas SP13

S: Puan, adakah Puan setuju dengan saya bahawa Puan sangat marah dengan kesemua keempat-empat Tertuduh?

J: Memang ya, sebab mereka saya kehilangan suami saya.

(see Appeal Record page 123, Volume 2B.)

Pemeriksaan Balas SP16

S: Dalam ingatan, mereka 4 orang yang menyebabkan kematian abang kamu?

J: Ya.

(see Appeal Record page 172, Volume 2B.)

[19] Of course no one in the right mind would blame these witnesses from harboring such negative feelings against the four appellants especially PW13, for they all have lost their loved one and it was their collective stand that these four appellants were the cause of that loss. However, in this case, there is not just the aspect of they being interested witnesses but the fact that the prosecution decided to call Bala's customary wife (PW12) to give evidence and her evidence was at variance with that of the said three witnesses which was not considered at all by the learned High Court Judge. She denied that Bala and Rasu came to the scene armed with parangs as alleged by the above-mentioned witnesses and instead of a fight as testified by them, she testified that Bala tried to persuade the deceased to apologise to her and discuss the matter amicably. The effect of this is that, as submitted by learned counsel, the prosecution has led two sets of evidence which contradicted each other and this must be construed against them and to the credit of the four appellants because there was no trustworthy evidence upon which the court can base the conviction on. This we say despite the fact that this witness admitted that the next day after the incident, Bala, her children and she left for Ipoh because she said they feared to be arrested. In this regard, the reasoning made by the Supreme Court of India in *Harchand Singh & Anor v. State of Haryana* [1974] AIR 344 at p. 347 is worth reproducing and it said:

> The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

Thus, we would agree, there was no credible evidence to support a *prima facie* case against the four accused. With hindsight, perhaps a better strategy would have been to offer PW12 to the defence, knowing very well that her evidence would naturally lean towards exculpating her husband from the charge.

[20] Moving now to the last two issues before the court and that is the common defence of the four appellants which in turn is related to the issue of the shoddy investigation by the police as submitted by Aingaran and Rasu's counsel before us.

Proven Defence

[21] As stated in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169:

> *To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice.* It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. *In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt*?
>
> (emphasis added)

[22] In this case before us, the common defence of the four appellants as stated earlier was that it was Yogeswaran and Sam who used the 'parang' to slash the victim. In connection with this stand, learned counsel referred us to the fact that at the initial stage of this case, there were seven persons charged in the Magistrate's Court including the four appellants. The investigating officer himself agreed in his cross-examination that seven persons were arrested in this case and that both Bala and Rasu in their caution statements mentioned that these two were the ones who dealt the blows on the victim. PW13 in her evidence agreed that there were two others who were involved in the attack on her husband. Then the evidence of the two prosecution witnesses offered to the defence, ie, Heng Wei Yong (DW5) and Traca Devi (DW6) who is PW12's sister also confirmed the involvement of these two characters and excerpts from their evidence as highlighted in learned counsel's written statement is reproduced below:

SD5 – Heng Wei Yong

Pemandu itu tumbuk leher Aingaran. Aingaran tidak ada pegang parang. Pemandu itu terus nak tetak Aingaran tapi salah satu kawan Aingaran terus tendang dan halang pemandu itu dan parang di tangan pemandu itu jatuh dan orang yang saya tidak kenal itu terus ambil parang itu dan tetak pemandu itu.

(see Appeal Record page 318, Volume 2D.)

SD6 – Traca Devi

Q: Saya katakan kepada kamu semasa itu Aingaran datang dengan Yoges dan Sam?

A: Memang ada dua orang datang, tapi saya tidak tahu nama dia.

(see Appeal Record page 332, Volume 2D.)

Q: Kemudian apa berlaku?

A: Semasa mereka berbincang. Keempat-empat OKT meminta Kataya meminta maaf dan kemudiannya Kataya enggan dan mencabar keempat-empat OKT, kemudiannya dia pergi ke belakang dan setelah itu dia membawa payung.

Q: Apa dia buat dengan payung?

A: Setelah itu, Aingaran telah tanya kenapa bawa payung dan Kataya telah tumbuk Aingaran. Aingaran terundur ke belakang. Saya tidak perasan samada Aingaran ada jatuh ke tidak. Selepas itu, Kataya telah keluarkan parang daripada payung tersebut dan payung tersebut dia serahkan kepada adiknya bernama Opi.

Q: Selepas itu apa berlaku?

A: Kataya cuba untuk menetak Aingaran. Masa itu 2 orang yang saya tidak kenali, orang yang ikut Aingaran datang tendang Kataya dan rampas parang dari Kataya.

Q: Apa jadi dengan parang itu?

A: Selepas ditendang Kataya telah jatuh dan dia telah lepaskan parang. Dan salah seorang lelaki itu mengambil parang itu daripada beliau. Selepas dia ambil parang dia terus menetak.

(see Appeal Record page 325-326, Volume 2D.)

[23] The investigating officer said he could not locate Yogeswaran and Sam and it would appear from his evidence at p. 241 of vol. 2C of the appeal record that he did not also record any statement from the victim's brother, Logeswaran (also known as Opi) who was at the scene. The investigating officer also said that Logeswaran did not turn up for the identification parade despite being called to do so and the evidence of PW13 at p. 137 of vol. 2B states that Logeswaran was arrested for another case and at p. 172 vol. 2B, PW16, the victim's other brother also confirmed the said fact. This shows that the investigating officer has the means to contact Logeswaran. The

investigating officer also agreed at p. 244 of the appeal record vol. 2C that without the statement from both Yogeswaran and Sam, his investigation into the case was not complete. Then at p. 252 of the appeal record vol. 2C he said this:

Soalan Tambahan Peguambela

Q: ASP Zakaria, setuju dengan saya dari semua percakapan yang kamu ambil daripada semua tertuduh ini kamu langsung tidak tanya satu soalan pun daripada semua tertuduh berkenaan dengan butir-butir atau alamat Yogeswaran dan Sam, setuju?

A: Tidak setuju.

Q: Setuju dengan saya langsung tiada satu soalan pun?

A: Setuju.

[24] Without the evidence of these witnesses, in particular that of Logeswaran whose attendance could have been procured by the prosecution given his detention/arrest although in an unrelated case, the failure to produce him has created a material gap in the prosecution case. This we say despite the law that it is not for the prosecution to negate the defence of an accused person but for someone whose role in the incident is as important as Logeswaran, failure to produce him given his availability amounts to a suppression of evidence as decided in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492. In this regard, it is also pertinent to refer to the Federal Court's decision in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301 which held that:

> *The Investigating officer's failure to investigate this allegation despite being informed of this fact during investigation was a serious omission. An inference in the accused's favour ought to have been drawn by the trial judge at the close of the prosecution case when the investigating officer's failure was brought to light*. If so, doubt would have been cast upon the evidence of the investigating officer.
>
> (emphasis added)

[25] It must also be remembered that the charge against the four appellants never mentioned the involvement of two or more others still at large. Yet, the evidence of the main three prosecution eyewitnesses referred to the involvement of others, besides the four appellants. It is also pertinent at this point to raise this quotation from the Federal Court in *Sia Soon Suan v. PP* [1965] 1 LNS 165; [1966] 1 MLJ 116 (FC) which said as follows:

> Nevertheless, **the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence**. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...
>
> (emphasis added)

[26] Learned counsel for Bala in his written submission ended his submission with a quote from the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1 which we are moved to adopt before concluding our judgment herein. The Federal Court held at para. [40] of the judgment that:

> [40] Normally, the appellate court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances. *But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the appellate court to step in and correct the legally erroneous decision* of the courts below. (emphasis added)

[27] With all due respect to the learned High Court Judge, we have indeed found such errors in this appeal when we examined the evidence before him, especially with regards to the different version of how the incident happened from the evidence of the victim's wife and relatives and that of Bala's wife which as we stated earlier was never even mentioned by His Lordship in his judgment. This omission must be seriously viewed when it is coupled with the failure to consider the probability put up by the defence that it was both Yogeswaran and Sam who caused the victim's death.

[28] In conclusion, we are of the view that the conviction of the four appellants under s. 304(a) of the Penal Code was not safe and for that reason, their appeals were allowed and that of the Public Prosecutor's dismissed as we all agreed with the initial finding of the learned High Court Judge that they have failed to prove beyond reasonable doubt the case against them on the murder charge.